which the court presided by Harun, J., heard an application to refer to the High Court certain questions of law arising out of the two awards; it did not hear any evidence or hand down any award. It was a differently constituted court but a court nevertheless as defined in section 2 of the Act to hear and determine a new and different matter which was only consequential to and an aftermath of the awards handed down previously.

We accordingly dismiss the appeal with costs.
Appeal dismissed.

Solicitors: *Eugene Lye & Co., D.P. Xavier & Co.*

VOO MIN EN & ORS. v. LEONG CHUNG FATT

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Salleh Abas F.J.) May 13 & July 5, 1982]

[Kota Kinabalu – Federal Court Civil Appeal No. 198 of 1981]

Landlord and tenant – Lease – Lease required to be in writing and registered – Provision for renewal by written request – Alleged oral agreement to extend lease – Agreement valueless – Sabah Land Ordinance, ss. 88, 104 & 105.

Practice and procedure – Application for summary judgment – Point raised in defence not constituting triable issue – Oral agreement to renew written lease – Not effective.

Evidence – Lease in writing – Whether oral agreement to vary it admissible – Evidence Act, 1950, s. 92.

In this case the respondent was the lessee of premises in Kota Kinabalu. The lease was in writing and registered in accordance with section 104 of the Sabah Land Ordinance. It provided for the possibility of renewal by written request. The lease was for a period of 16 years commencing on January 16, 1965. On the expiration of the lease the respondent only delivered part of the premises to the appellant and retained the ground floor. The appellant claimed possession of the ground floor and in his defence the respondent alleged that there was an oral agreement for a new lease. The appellant applied for final judgment but this was refused as the learned trial judge held that there was a triable issue. The appellants appealed.

Held: (1) an option or right to renew a lease is always treated by the law as a privilege which must be exercised strictly within the terms in which the option or right is given, otherwise the option or right is lost. The alleged oral agreement in this case could not renew the lease as it is completely outside the purview of the clause for renewal in the lease;

(2) the oral agreement could not be admitted as to do so would be contrary to section 92 of the Evidence Act. As the lease in this case was required to be in writing by virtue of section 104 of the Sabah Land Ordinance and has been registered in accordance with the Ordinance, there is no way in which the respondent's alleged agreement could be proved under proviso (d) to section 92 of the Evidence Act.

(3) it is clear that the alleged agreement is valueless as it is neither in writing nor registered and is contrary to sections 88, 104 and 105 of the Sabah Land Ordinance:

(4) the point raised by the respondent as to the existence of the oral agreement to renew the lease of the demised premises in this case is not an arguable issue, as it is neither effective nor admissible and therefore does not constitute a triable issue. The appellants should therefore be allowed to sign final judgment against the respondent.

Cases referred to:–

(1) *West Country Cleaners (Falmouth) Ltd.* v. *Saly* [1966] 3 All E.R. 210, 212.
(2) *Leong Gan & Ors.* v. *Tan Chong Motor Co. Ltd.* [1969] 2 M.L.J. 8.
(3) *Mark D'Cruz* v. *Jitendra Nath Chatterjee* (1919) I.L.R. 46 Cal. 1079.
(4) *Cow* v. *Casey* [1949] 1 K.B. 474, 481.

FEDERAL COURT.

C.Abraham (*Alex Decena* with him) for the appellants.

Gerald Math for the respondent.

Salleh Abas F.J. (delivering the Judgment of the Court): This is an appeal from the decision of Wan Mohamed J. refusing the appellants' summons-in-chambers to sign final judgment to recover vacant possession of certain demised premises from the respondent.

The respondent was the lessee of the demised premises, i.e. the ground floor and the first floor of the building erected on lot 22, Block 33, Kampung Ayer, Kota Kinabalu. According to the lease agreement which he entered into with the first appellant, Voo Min En, the lease was for a period of sixteen years commencing on January 16, 1965. The lease was duly registered in accordance with section 104 of the Sabah Land Ordinance. On the expiration of the lease on January 16, 1981, only part of the demised premises, namely the first floor was delivered up by the respondent. He retained and still continues to retain the ground floor. When sued for the recovery of this floor the respondent stated in his statement of defence that a new lease for a further term of eight years commencing from January 16, 1981 was created in his favour as a result of an oral agreement on August 30, 1980 between him and Mr. Wong Phu Yin, who was then one of the owners of the demised premises. The first plaintiff and Mr. Wong Phu Yin in their respective affidavits sworn on April 10 and

11, 1981 in support of the summons-in-chambers denied that there was an oral agreement. They claimed that what actually happened was that on August 30, 1980 the respondent made an oral offer to renew the lease of the ground floor at certain rentals, but this offer was not agreed to by the appellants.

Thus the respondent raised an issue as to the existence of an oral agreement renewing the lease. The learned judge accepted this issue as a triable issue and therefore dismissed the appellants' application to sign final judgment. Hence this appeal.

The question which calls for our decision in this appeal is whether the learned judge was correct in holding that the existence of the so-called oral agreement between the parties purporting to renew the lease is a triable issue.

It is not disputed that the lease is in writing and also registered under the appropriate provisions of the Sabah Land Ordinance (Cap 68). It is also not disputed that according to clause 2 (3) of the lease the renewal is exercisable subject to the following three conditions, namely:–

(1) the respondent as the lessee has to give a written request for the renewal at least three months prior to the expiration of the lease;

(2) he is not guilty of any breach or non-observance of any covenant contained in the lease; and

(3) the appellants as lessor do not need the demised premises for their own use.

It is clear that the respondent did not avail himself of the provision of this clause as at no time did he make any written request to renew the lease as required by the clause. The law on the question of the renewal of a lease is settled in that an action or a right to renew a lease is always treated by the law as a privilege which must be exercised strictly within the terms in which the option or the right is given, otherwise the option or the right is lost, *West Country Cleaners (Falmouth) Ltd.* v. *Saly*[1]. Since the respondent gave no written request as required by clause 2 (3) of the lease, there is thus no question of the lease being renewed at all. The alleged oral agreement, even if proved, could not renew the lease, because it is completely outside the purview of this clause. Further, unless and until this clause is amended or modified so as to include an oral agreement as a mode of renewal, the alleged oral agreement remains ineffective and irrelevant.

But the respondent maintained in his affidavit sworn on May 20, 1981 in reply to the appellants' summons-in-chambers that the alleged oral agreement "impliedly supplement clause 2 (3) of the lease agreement". In other words the respondent said that an oral agreement to renew the lease is outside the scope of the clause but nevertheless insisted that the alleged oral agreement should be treated as a modification or amendment of the lease. The question of modification of a written agreement by a subsequent oral agreement is governed by section 92 of the Evidence Act and in particular its proviso (d). The section and the relevant proviso are reproduced as follows:

"92. When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that –

x x x

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved *except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;*"

(The emphasis is ours)

It is clear that to admit the alleged oral agreement in evidence would amount to varying or adding to the provision of clause 2 (3) of the lease. This is contrary to section 92 of the Evidence Act. The alleged oral agreement is therefore not admissible. Further, even if we treat the alleged oral agreement as a "distinct subsequent oral agreement" within the meaning of proviso (d), it is still inadmissible because a distinct subsequent oral agreement to modify an earlier written agreement could only be proved in limited cases. It cannot be proved in cases where the earlier written agreement requiring modification is itself required by law to be in writing, or has been registered according to the law in force as to the registration of documents. As the lease in this case by virtue of section 104 of the Sabah Land Ordinance is required to be in writing and has been registered in accordance with this Ordinance, there is no way in which the respondent's alleged oral agreement could be proved under proviso (d). The position here is the same as that

decided by Raja Azlan Shah J., as he then was, in *Leong Gan & Ors.* v. *Tan Chong Motor Co. Ltd.*[2] See also *Mark D'Cruz* v. *Jitendra Nath Chatterjee.*[3] In both these cases an oral agreement to renew an existing lease was held inadmissible. As the admissibility of the alleged oral agreement is both prohibited by section 92 of the Evidence Act and proviso (d) to the section, the provision of clause 2 (3) of the lease remains unmodified or unamended. It also remains unacted upon because an attempt to renew it by means of the oral agreement cannot be effective; it being contrary to the provision of the renewal clause. Thus the alleged oral agreement is neither effective, nor admissible to prove the renewal.

Even if we view the alleged oral agreement from the standpoint of the Sabah Land Ordinance, it is clear that the agreement is valueless, as it is neither in writing nor registered; it being contrary to the requirements of sections 88, 104 and 105 of the Ordinance.

That being the case, it is not enough for the respondent in answer to the appellants' application to sign final judgment, to raise an issue, or any issue. He must, however, raise such issue as would require a trial in order to determine it. In other words, the issue raised must be an arguable issue. But where the issue raised is irrelevant and ineffective, or to use the words of Lord Greene, M.R. in *Cow* v. *Casey*[4] "when the point is understood and the court is satisfied that it is really unarguable", the appellants should be entitled to what they prayed for in the summons-in-chambers.

In our view the point raised by the respondent as to the existence of an oral agreement to renew the lease of the ground floor of the demised premises in this case is really not an arguable issue as it is neither effective, nor admissible, and therefore does not constitute a triable issue. The appellants should be and are therefore allowed to sign final judgment in terms of the summons-in-chambers.

The appeal is allowed with costs. The deposit should be refunded to the appellants.

Appeal allowed.

Solicitors: *Jayasuriya Kah & Co.; Shelley Yap & Co.*

MERDEKA UNIVERSITY BERHAD v. GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Salleh Abas & Abdul Hamid F.JJ.; and Seah J., dissenting) February 15-19, 22, 23, 25 & 26, July 6, 1982] [Kuala Lumpur – Federal Court Civil Appeal No. 236 of 1981]

Administrative Law – Declaration – Claim for declaration that rejection of application of petition for establishment of Merdeka University null and void – Allegation that refusal of petition for establishment of the University unreasonable and improper exercise of discretion – Principles of judicial review – Effect of subjective formula as to satisfaction – Whether University a public authority within the definition of Federal Constitution – National Language – Official purposes – Universities and University Colleges Act, 1971, ss. 3, 5, 6, 7, 8, 11, 13, 15A and 15D – Federal Constitution, arts. 8(2), 12(1)(a), 40(1), 152 & 160.

Constitutional Law – Yang di-Pertuan Agong a Constitutional monarch acting on ministerial advice – Principles of Constitutional interpretation – Whether University a public authority within the meaning of the Federal Constitution – National language – Official purposes – Federal Constitution, articles 8(2), 12(1)(a), 40(1), 152 & 160.

Education – Petition for establishment of University – Whether University a public authority under the Federal Constitution – National Language – Official purpose – Universities and University Colleges Act, 1971, ss. 3, 5, 6, 7, 8, 11, 12, 13, 15A & 15D – Federal Constitution, arts. 152 & 160.

Interpretation – Principles of Constitutional interpretation – Maxim "noscitur a sociis" – Ejusdem generis.

This was an appeal from the decision of the High Court reported in [1981] 2 M.L.J. 356.

The appellant, a company limited by guarantee, submitted a petition to the Yang di Pertuan Agong for an incorporation order for Merdeka University under section 6 of the Universities and University Colleges Act, 1971. The petition was rejected and the Minister of Education announced that the rejection of the appellant's petition was for the following reasons:

(a) Merdeka University would use Chinese as the medium of instruction;

(b) it was meant to cater for students from Chinese independent secondary schools;

(c) it was to be set up by the private sector;

and as a composite of the basis for rejection, that in effect its establishment would be contrary to the national education policy.

The appellant issued a writ asking for a declaration that the rejection of the petition for the establishment of the Merdeka University was null and void as it contravened the Federal Constitution and for a declaration that the refusal of the petition to establish a University was an unreasonable and improper exercise of the discretion conferred by section 6 of the Universities and University Colleges Act, 1971. The learned Judge held that the rejection was law-